

## An Analysis and Critique of the 1992 Changes to New Zealand's Accident Compensation Scheme

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# AN ANALYSIS AND CRITIQUE OF THE 1992 CHANGES TO NEW ZEALAND'S ACCIDENT COMPENSATION SCHEME\*

RICHARD S. MILLER\*\*

Because of alleged deficiencies in the tort system as a means of dealing with personal injury accidents in the United States,<sup>1</sup> there continues to be great interest in New Zealand's no-fault accident compensation scheme as a possible alternative.<sup>2</sup>

The New Zealand scheme, first adopted in 1972, provided benefits—without requiring any proof of fault—to persons suffering “injury by accident.”<sup>3</sup> These benefits included medical and rehabilitative expenses, compensation for eighty percent of lost earnings as long as disability continued, and lump-sum payments of up to \$27,000(N.Z.) for non-economic losses, as well as other necessary expenses.<sup>4</sup> The most significant feature of the scheme, however, was that where it provided “cover”—where a person suffered “injury by accident”—*the right to bring a civil action in tort for damages was abolished.*<sup>5</sup>

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1. See, e.g., STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISM FOR VICTIMS, CONSUMERS, AND BUSINESS* 1-72 (1989).

2. See, e.g., MASANOBU KATO, *LIABILITY DAMAGES TO SOCIAL INSURANCE—COMPENSATING PERSONAL INJURY VICTIMS* (1989). Law students in the United States are routinely exposed to alternatives to tort law, including the New Zealand accident compensation scheme. See, e.g., MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES—CASES AND MATERIALS* 787-94 (5th ed. 1992); JAMES A. HENDERSON, JR. & RICHARD N. PEARSON, *THE TORTS PROCESS* 899-910 (3d ed. 1988); JERRY J. PHILLIPS ET AL., *TORT LAW—CASES, MATERIALS, PROBLEMS* 1284-86 (1991).

3. Accident Compensation Act, 1982, No. 181, 1982 N.Z. Stat. 1552 [hereinafter 1982 Act] (consolidating and amending the 1972 Accident Compensation Act and its amendments).

4. *Id.* Parts V-VII, 1982 N.Z. Stat. 1606-67. Dollar amounts are in New Zealand dollars, which in April 1992 were exchangeable at about \$.55(U.S.) apiece. Thus, \$27,000(N.Z.) is worth a little less than \$15,000(U.S.).

5. *Id.* § 27(1), 1982 N.Z. Stat. 1573.

The New Zealand scheme has been described by W.F. Birch, New Zealand's Minister of Labour, as "one of the world's most advanced schemes for compensating the victims of accidents. . . ."<sup>6</sup> But the current New Zealand government, a National rather than a Labour government, has imposed what Minister Birch characterizes as "the most radical reforms to the accident compensation scheme since it first provided cover in 1974."<sup>7</sup> Most of these reforms took effect when the Accident Rehabilitation and Compensation Act of 1992 went into force on July 1, 1992.<sup>8</sup>

It is the purpose of this paper to describe the more significant changes made by the National government to New Zealand's accident compensation scheme and to analyze their likely effects.<sup>9</sup>

First, however, it is important to note the clearly identifiable change in the underlying philosophy of the accident compensation scheme. Justice Owen Woodhouse, who may rightly be called the Father of the New Zealand accident compensation scheme, identified the basic principle of the original program as community or collective—as opposed to individual—responsibility.<sup>10</sup> In his view, the scheme reflected a concept of social insurance; it was not a private insurance scheme.<sup>11</sup>

By contrast, the present government considers the new Act to be a scheme of *accident insurance*,<sup>12</sup> including premiums to be paid by individuals who will benefit under the program. This important philosophical change is reflected in the title of the new Act, the Accident Rehabilitation and Compensation *Insurance* Act of 1992, and in the new name of the former Accident Compensation Corporation, the governmental body that operates the scheme: the Accident Rehabilitation and Compensation *Insurance* Corporation. It is also reflected in another change of language: Charges against those who must pay for the scheme, formally referred to as "levies," are now

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6. W.F. BIRCH, ACCIDENT COMPENSATION: A FAIRER SCHEME i (1991).

7. *Id.* at 66.

8. Accident Rehabilitation and Compensation Insurance Act 1992, No. 13 [hereinafter 1992 Act].

9. For my description and views of the New Zealand scheme *prior* to the current amendments, see Richard S. Miller, *The Future of New Zealand's Accident Compensation Scheme*, 11 U. HAW. L. REV. 1 (1989).

10. ROYAL COMMISSION OF INQUIRY, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND 40 (1967) [hereinafter THE WOODHOUSE REPORT]. The Commission was chaired by Justice Woodhouse.

11. NEW ZEALAND LAW COMMISSION, PERSONAL INJURY: PREVENTION AND RECOVERY: REPORT ON THE ACCIDENT COMPENSATION SCHEME 4-5 (1988) [hereinafter REPORT NO. 4].

12. BIRCH, *supra* note 6, at 15.

explicitly called "premiums."<sup>13</sup>

## I. THE RIGHT TO BRING A COMMON-LAW ACTION

As in the prior law, the most important feature of the new Act is that civil tort actions for compensatory damages for covered personal injuries are abolished.<sup>14</sup> Importantly, however, as under the 1982 Act, a victim is *not* precluded from bringing a civil tort action for damages with respect to injuries not covered by the scheme;<sup>15</sup> therefore, a rule or court decision of no coverage opens the door to a possible claim for damages under the common law of torts.

## II. COVERAGE

The prior Act covered "personal injury by accident,"<sup>16</sup> which was defined to include: "[t]he physical and mental consequences of any such injury or of the accident";<sup>17</sup> "[m]edical, surgical, dental, or first aid misadventure,"<sup>18</sup> otherwise undefined; "[i]ncapacity resulting from an occupational disease or industrial deafness,"<sup>19</sup> as more specifically defined;<sup>20</sup> and "[a]ctual bodily harm (including pregnancy and mental or nervous shock)" arising from acts or omissions that fit the description of certain sexual crimes.<sup>21</sup>

An important difference in the new Act is the apparent exclusion of cover for mental distress not associated with physical injury to the person seeking cover.<sup>22</sup> This exclusion may result in denial of cover of injuries from intentional or negligent infliction of emotional distress.

Perhaps the most radical change to coverage is the extent to which the Act now seeks to define coverage for harm caused by the

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13. See 1992 Act, *supra* note 8, § 134. Section 134 reads, "Levies paid or payable under the Accident Compensation Act 1982 shall be deemed to be premiums paid or payable for the purposes of this Act."

14. *Id.* § 14.

15. Civil actions at law to recover punitive or exemplary damages for outrageous conduct are still permitted. See *Auckland City Council v. Blundell*, [1986] 1 N.Z.L.R. 732, 739; *Donselaar v. Donselaar*, [1982] 1 N.Z.L.R. 97, 104-07.

16. 1982 Act, *supra* note 3, § 26(1), 1982 N.Z. Stat. 1577.

17. *Id.* § 2(1), 1982 N.Z. Stat. 1560.

18. *Id.*

19. *Id.*

20. *Id.* §§ 28, 29, 1982 N.Z. Stat. 1579-80.

21. *Id.* § 2(1), 1982 N.Z. Stat. 1560.

22. The new Act states that "[f]or the purposes of this Act, 'personal injury' means the death of, or physical injuries to, a person, and any mental injury suffered by that person *which is an outcome of those physical injuries to that person* . . ." 1992 Act, *supra* note 8, § 4(1) (emphasis added). See also *id.* § 8(3).

acts or omissions of health care professionals. While the former Act merely stated that personal injury by accident included "medical, surgical, dental, or first aid misadventure," without further definition,<sup>23</sup> the new Act includes a definition of medical misadventure spanning nearly two pages.<sup>24</sup> The result is that in cases in which claimants seek compensation for "medical misadventure," proceed-

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23. 1982 Act, *supra* note 3, § 2(1), 1982 N.Z. Stat. 1560.

24. The Act states:

(1) For the purposes of this Act,—

"Medical error" means the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances. It is not medical error solely because desired results are not achieved or because subsequent events show that different decisions might have produced better results:

"Medical misadventure" means personal injury resulting from medical error or medical mishap:

"Medical mishap" means an adverse consequence of treatment by a registered health professional, properly given, if—

(a) The likelihood of the adverse consequence of the treatment occurring is rare; and

(b) The adverse consequence of the treatment is severe.

(2) For the purposes of the definition of the term "medical mishap", the likelihood that treatment of the kind that occurred would have the adverse consequence shall be rare only if the probability is that the adverse consequence would not occur in more than 1 percent of cases where that treatment is given.

(3) Where the likelihood that an injury would occur is in the ordinary course rare, but is not rare having regard to the circumstances of the particular person, it shall not be medical mishap if the greater risk to the particular person injured—

(a) Was known to that person; or

(b) In the case of a person who does not have legal capacity, was known to that person's parent, legal guardian, or welfare guardian, as the case may be,

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prior to the treatment.

(4) For the purposes of the definition of the term "medical mishap", the adverse consequences of treatment are severe only if they result in death or

(a) Hospitalisation as an inpatient for more than 14 days; or

(b) Significant disability lasting for more than 28 days in total; or

(c) The person qualifying for an independence allowance under section 54 of this Act.

(5) Medical misadventure does not include personal injury arising from abnormal reaction of a patient or later complication arising from treatment procedures unless medical misadventure occurred at the time of the procedure.

(6) A failure to obtain informed consent to treatment from the person on whom the treatment is performed or that person's parent, legal guardian, or welfare guardian, as the case may be, is medical misadventure only if the registered health professional acted negligently in failing to obtain informed consent.

(7) Medical misadventure does not include a failure to diagnose correctly the medical condition of any person or a failure to provide treatment unless that failure is negligent.

ings are likely to turn into actions to prove medical negligence or malpractice.<sup>25</sup>

### III. BENEFITS

#### A. *Retention of Earnings-Related Compensation*

Under the new Act, there have been significant changes in benefits. Nonetheless, it should be noted that earnings-related compensation, measured as eighty percent of lost earnings, remains in place.<sup>26</sup> Further, as in the former Act,<sup>27</sup> the employer pays for the first week of benefits if the injury is a work injury,<sup>28</sup> and the Accident Corporation pays for all earners' injuries, on or off the job, after the first week.<sup>29</sup> The maximum amount payable as compensation for loss of earnings is \$1,179(N.Z.)—about \$650(U.S.)—per week.<sup>30</sup>

#### B. *Elimination of Lump Sums for Non-Economic Losses*

Perhaps the most important and controversial change—from the viewpoint of employees and labor unions<sup>31</sup>—is the elimination of lump-sum payments for non-economic losses. The 1982 Act allowed lump-sum payments of up to \$17,000 for permanent loss or

(8) Medical misadventure does not include any personal injury resulting from the carrying out of any drug trial or clinical trial where the injured person has agreed in writing to participate in the trial.

(9) In making any decision under this section the Corporation shall obtain and have regard to independent advice in accordance with procedures prescribed by regulations made under this Act.

(10) Where the Corporation considers that medical misadventure may be attributable to negligence or an inappropriate action on the part of a registered health professional it shall—

(a) Give the registered health professional a reasonable opportunity to comment on the matter; and

(b) If satisfied that there may have been negligence or inappropriate action—

report the circumstances to the appropriate body with a view to the institution of disciplinary proceedings, and to any other body that may be appropriate.

1992 Act, *supra* note 8, § 5.

25. See *infra* text accompanying notes 101-113.

26. See 1992 Act, *supra* note 8, § 39(1) ("The weekly compensation for earnings payable to an earner who is incapacitated as a result of personal injury . . . is 80 percent of the earner's weekly earnings.").

27. 1982 Act, *supra* note 3, §§ 57(2)(a), 59(1), 1982 N.Z. Stat. 1619, 1622.

28. 1992 Act, *supra* note 8, § 38.

29. *Id.* § 39.

30. This maximum is subject to annual adjustments to reflect "movements in average weekly earnings." 1992 Act, *supra* note 8, §§ 48, 70.

31. Despite its obvious drawbacks to injured employees, this change was supported by both the Law Commission and the Labour Party. See REPORT NO. 4, *supra* note 11, at 21.

impairment of bodily function,<sup>32</sup> and lump-sum payments of up to \$10,000 for loss "of amenities or capacity for enjoying life, including loss from disfigurement; and . . . [p]ain and suffering, including nervous shock and neurosis."<sup>33</sup> Together, these items constituted a significant part of the cost of the accident compensation scheme.<sup>34</sup> The elimination of these non-economic losses moves the scheme away from its historical roots as a substitute for the civil tort action.

### C. *Provision of an Independence Allowance*

In place of lump sums for non-economic losses, the new Act provides for an "independence allowance" based upon the degree of the claimant's disability, commencing not earlier than thirteen weeks after the injury for which it is paid.<sup>35</sup> The allowance is \$40 per week, paid quarterly, for a person with 100 percent disability, to be scaled downward, in accordance with regulations to be promulgated, for those with lesser disability.<sup>36</sup> No allowance is paid to those with less than ten percent disability.<sup>37</sup> Under this provision, the degree of a person's disability must be reassessed at intervals of not more than five years.<sup>38</sup>

The purpose of the independence allowance, in the language of Minister of Labour Birch, is "to enable those injured to meet the additional costs arising from a permanent disability during the remainder of their li[ves]."<sup>39</sup> The relatively small amount provided is designed "to cover miscellaneous expenses associated with disability."<sup>40</sup> The payment is to be adjusted annually to reflect changes in the Consumer Price Index.<sup>41</sup> It cannot be converted to a lump sum.<sup>42</sup>

In addition to the independence allowance, additional expenses and costs for care—for purchase or modification of motor vehicles, modifying a residence, household help, childcare, and for wheel-

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32. 1982 Act, *supra* note 3, § 78(1), 1982 N.Z. Stat. 1650-51.

33. *Id.* § 79(1), 1982 N.Z. Stat. 1652-53.

34. See REPORT NO. 4, *supra* note 11, at xiv.

35. 1992 Act, *supra* note 8, § 54(1), (2).

36. *Id.* § 54 (3), (4).

37. See *id.* § 54(1) ("[E]very person who has cover under this Act is entitled to receive an independence allowance where the person's personal injury has resulted in a degree of disability of 10% or more.").

38. *Id.* § 54(11).

39. BIRCH, *supra* note 6, at 47.

40. *Id.* at 49.

41. 1992 Act, *supra* note 8, § 71.

42. See *id.* § 74(1) ("Except as provided in this section and section 54(3) of this Act, the Corporation shall not pay any compensation, grant, or allowance in advance.").

chairs and other necessary equipment or appliances—will be covered, as in the prior Act,<sup>43</sup> as part of the rehabilitation of the accident victim.<sup>44</sup>

*D. Re-evaluation of the Permanence of Incapacity*

An important change, at least from the perspectives of both moral hazard and rehabilitation, is the elimination of the provision in the former Act that prohibited reduction of the earnings-related compensation of a person determined to be permanently incapacitated.<sup>45</sup> This provision was designed to encourage permanently disabled workers to seek rehabilitation, though it may have led some workers to feign permanent incapacity. Section 51 of the new Act requires periodic reassessments at intervals of not less than six months for individuals assessed at having a capacity for work of less than eighty-five percent, unless the Accident Corporation “is satisfied that no purpose would be served by a further assessment . . . .”<sup>46</sup>

*E. Earnings-Related Compensation Not Allowed as a Substitute for Unemployment Compensation*

Even more significant is a provision in the new law that prevents the accident compensation scheme from being used, at least after the first twelve months following the incapacity, as unemployment compensation.<sup>47</sup> By virtue of section 59(2)<sup>48</sup> of the former Act, claimants who were able to return to work, though not necessarily in their previous occupations, would continue to receive earnings-related compensation if there was no “appropriate” work available. In view of the serious recession in New Zealand, this provision evidently became very expensive: Minister Birch estimated that it was costing \$40 million annually in recent years.<sup>49</sup> Under the new Act, there is a grace period of twelve months after the incapacity has started, but if at that time the worker is determined to have a capacity for work of eighty-five percent or more, eligibility for earnings-related compensation ceases, irrespective of whether suitable

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43. See 1982 Act, *supra* note 3, § 37(3)(e)-(g), 1982 N.Z. Stat. 1592 (providing coverage for modifications to the home, purchase of wheelchair and other aids for daily living, and purchase or modifications of motor vehicles).

44. 1992 Act, *supra* note 8, § 26 (titled “Social Rehabilitation”).

45. 1982 Act, *supra* note 3, § 60(5), 1982 N.Z. Stat. 1627.

46. 1992 Act, *supra* note 8, § 51(4).

47. *Id.* § 49.

48. 1982 Act, *supra* note 3, § 59(2), as amended, 1985 N.Z. Stat. 321, 324.

49. BIRCH, *supra* note 6, at 43.



employment opportunities are available.<sup>50</sup>

#### F. *Loss of Earning Capacity of Non-Earners*

A feature of the prior Act that had been criticized was the treatment of non-earners who became accident victims.<sup>51</sup> Children under 16 or in school or apprenticeship programs who were injured were allowed minimal earnings-related compensation based in part on lost earning capacity.<sup>52</sup> But homemakers—including those who had taken time off from their profession or outside occupation to raise a family—and other non-earners were not entitled to earnings-related compensation based on their lost earning capacity. The new Act purports to deal with that problem by allowing certain persons to pay premiums to purchase the right to receive compensation for lost earning capacity in the event of an accident.<sup>53</sup>

#### G. *Medical and Health Benefits*

One of the problems complained of under the prior Act was that accident victims had access to expensive and often preferred private hospitals and other private medical and surgical services not available under the public health system to victims of illness.<sup>54</sup> This created an incentive for doctors and patients to classify illnesses as accidents.<sup>55</sup> Another problem was that patients who were charged

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50. 1992 Act, *supra* note 8, § 49.

51. See Miller, *supra* note 9, at 8-9.

52. 1982 Act, *supra* note 3, §§ 62, 63, 1992 N.Z. Stat. 1630-34.

53. 1992 Act, *supra* note 8, § 45. The new provision, however, seems inadequate to the task: First, it only applies to those who are or have been earners, *id.* § 45(1), who have had 12 months of continuous employment, *id.* § 45(2)(a), and who make the election while still employed or within a month after ceasing to be employed, *id.* § 45(2)(b). Second, the amount to be treated as earnings must be specified, *id.* § 45(5), and that amount may be "the weekly earnings of the person calculated under this Act as if the incapacity of the person commenced more than 5 weeks before the date of the election" or a lesser amount. *Id.* § 45(6). Third, compensation is payable under this provision for a maximum of 5 years from the date of the incapacity, irrespective of how long the incapacity actually continues. *Id.* § 45(8). And fourth, the amount of the premiums charged is to be determined "with the objective of there being sufficient in any year to meet the full costs of the compensation payable under this section in that year and future years for any claims made under this section in respect of personal injury suffered in that year and the costs of administration of this section in that year." *Id.* § 45(10). A less generous provision can hardly be imagined. Certainly it offers little to compensate an injured homemaker who earned professional competence by virtue of her education but who was either working at an entry-level position when she elected to purchase the protection or, under the highly restrictive requirements of this section, could not purchase the protection at all.

54. Cf. BIRCH, *supra* note 6, at 55-56.

55. *Id.* at 55.

little or nothing for their health care had little motivation or incentive to keep costs low.<sup>56</sup>

Recognizing these problems, the New Zealand government has evidently inaugurated "user part charges" for publicly funded health care and required, or intends to promulgate regulations to require, accident victims to "pay user charges for pharmaceuticals, laboratory diagnostic tests and some public hospital services on the same basis as the sick," and also to require them to "pay the same targeted user charges for general practitioner visits as the sick."<sup>57</sup> With regard to private hospitals and other health care providers, the Government evidently intends to increase beneficiaries' charges by reducing the maximum that the Accident Corporation can pay.<sup>58</sup>

#### IV. FUNDING AND DETERRENCE

Apart from the change of label for philosophical purposes from "levies" to "premiums,"<sup>59</sup> there are some significant changes wrought by the new Act both in the way that the scheme will be funded and in the way that premiums will be allocated and adjusted to internalize costs to those who cause accidents.

##### A. *The Former Act*

Under the former Act, levies on employers covered both work- and nonwork-related accidents of earners, levies on motor vehicle owners covered motor vehicle accidents, and general taxes covered accidents to non-earners.<sup>60</sup> Levies on employers varied according to the past accident-cost-experience of the industrial group into which each employer fell; levies on motor vehicle owners varied according to the class of vehicle.<sup>61</sup> While there was authority under the former Act to engage in experience rating by awarding bonuses and assessing penalties to individual employers,<sup>62</sup> this authority was not being exercised.<sup>63</sup> Statutory authority to impose levies on motor vehicle drivers and to impose penalties for poor driving records<sup>64</sup> was also never

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56. *Id.*

57. *Id.* at 56.

58. *Id.*

59. See *supra* text accompanying note 13.

60. See *ACC Levies Due for Payment by 31 May 1989—Employers*, 7 February 1990—*Self-Employed*, ACCIDENT COMP. CORP., Jan. 1989, at 5-6.

61. *Id.*

62. 1982 Act, *supra* note 3, § 40, 1982 N.Z. Stat. 1593-94.

63. See REPORT NO. 4, *supra* note 11, at 39.

64. 1992 Act, *supra* note 8, § 49(d), 1982 N.Z. Stat. 1604.

exercised.<sup>65</sup>

### B. *The New Act*

1. *Work Injuries*.—Under the new Act, employers pay premiums, again adjusted by industry class,<sup>66</sup> into an employer account that covers only work injuries and certain industrial diseases, not including work-related motor vehicle injuries.<sup>67</sup>

2. *Earners' Nonwork Injuries*.—One of the most controversial features of the 1992 Act is the removal from employers of the obligation to fund employees' nonwork injuries, and the imposition on employees of the obligation to pay for insurance against such injuries.<sup>68</sup>

The initial premium for non-earners is 70 cents per \$100 of earnings.<sup>69</sup> The new Act requires employers to withhold premiums from employees' wages and pay them into the Earners' Account.<sup>70</sup>

3. *Non-earners' Injuries*.—Apart from a new section that permits some non-earners to pay premiums for protection against loss of earning capacity,<sup>71</sup> benefits for non-earners who are injured other than in motor vehicle accidents will continue to be funded by general tax revenues.<sup>72</sup>

4. *Motor Vehicle Accident Injuries*.—The costs of motor vehicle accidents will continue to be borne—at least in part—by motor vehi-

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65. Although recognizing the possible deterrent advantages of experience rating, the Law Commission ultimately concluded that experience rating and penalties and bonuses could not fairly or effectively be imposed. See REPORT No. 4, *supra* note 11, at 36-40.

66. 1992 Act, *supra* note 8, § 103.

67. *Id.* §§ 100, 101. A unique feature of the new Act with regard to employees' work injuries is that an employer may apply for the status of "exempt employer." *Id.* §§ 105-07. If the status is granted by the Accident Rehabilitation and Compensation Insurance Corporation, the exempt employer becomes, in effect, a self-insurer with regard to its employees' work injuries for a 12-month period following each such injury. *Id.* § 106(1). One year following the injury, the Accident Corporation assumes the obligation with respect to that employee. *Id.* § 106(2). The reward to an employer for becoming an exempt employer is to have its premium reduced to reflect the cost saving to the Accident Corporation. *Id.* § 106(3). The status of exempt employer may only be granted for one year at a time. *Id.* § 105(1), (2).

68. *Id.* §§ 113-16.

69. BIRCH, *supra* note 6, at 25. The plan was to impose a premium between 50 and 70 cents. The author has been informed that the premium has been set at 70 cents per \$100 of earnings.

70. See 1992 Act, *supra* note 8, § 115.

71. See *supra* note 53 and accompanying text.

72. See 1992 Act, *supra* note 8, § 120.

cle owners, through premiums to be paid in conjunction with the annual registration and licensing of vehicles.<sup>73</sup> There is, however, an interesting innovation: in order "to assist with public health costs of injuries arising from motor vehicle accidents,"<sup>74</sup> the government increased the tax on "motor spirit"<sup>75</sup> by two cents per liter and is obligated to pay this amount to the Accident Corporation annually for the benefit of the Motor Vehicle Account.<sup>76</sup> The avowed purpose of this charge is to "alert individual drivers to the real costs of accidents, especially public health costs."<sup>77</sup>

5. *Medical Misadventure Injuries*.—In the former Act, health professionals were treated no differently from other self-employed persons, occupations, or businesses: their levies were based upon their industry class, which, in turn, was charged in accordance with the injury experience of *persons working in that industry*.<sup>78</sup> In short, premiums were not based on the accidental harm the professional caused to patients, but on the injury experience of the professional and the professional's employees with regard to *their own* accidental injuries. In consequence, levies to health professionals—who are in a relatively nondangerous profession—tended to be relatively low.<sup>79</sup>

The 1992 Act, however, creates a new account known as the Medical Misadventure Account.<sup>80</sup> Its purpose is to finance benefits required to be paid under the new Act to victims of what may be deemed medical malpractice.<sup>81</sup> Premiums are to be set by classes of certified health professionals as established by regulations.<sup>82</sup> Classes may include different fields of specialization, as well as different categories of health professionals.<sup>83</sup> Funds to pay benefits to victims of medical misadventure are to be derived from "[a]ny premiums that may be payable by registered health professionals of the same class as the registered health professional responsible for the

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73. See *id.* § 110.

74. BIRCH, *supra* note 6, at 27.

75. Presumably this includes gasoline and other motor vehicle fuels. See generally 1992 Act, *supra* note 8, § 109.

76. See *id.* § 109(1),(4).

77. BIRCH, *supra* note 6, at 27.

78. See generally 1982 Act, *supra* note 3, §§ 38-44, 1982 N.Z. Stat. 1592-99.

79. Thus, for example, the levy that was due on February 7, 1990, for those in the practice of medicine, was \$1.35 per \$100 of payroll. By way of comparison, the levy for someone in the milk distribution business was \$2.75, in the millinery retailing business \$1.65, and in the scrap metal business \$11.00. See ACC Levies, *supra* note 60, at 37.

80. See 1992 Act, *supra* note 8, § 122-24.

81. See *id.* § 122(1).

82. See *id.* § 123(5).

83. See *id.*

medical misadventure.”<sup>84</sup>

The upshot is that, for the first time since the advent of its accident compensation scheme, New Zealand has created a system of economic accountability to third persons—where one class of injury-causers will be charged for the costs of injuries not just to that class’s employees but to other persons whom that class has injured.<sup>85</sup>

6. *Experience Rating and Internalizing Costs.*—The new Act provides for “experience rating,” which may result in “no-claims bonuses, increased premiums, or claim thresholds.”<sup>86</sup> Experience rating is applicable to all those from whom premiums are to be collected—employers (including self-employeds), motor vehicle owners, earners, and persons liable to pay medical misadventure premiums.<sup>87</sup>

With regard to premiums on employers, the New Zealand government apparently felt that experience rating would overcome the “problems of broad industry classifications” and regarded “[t]he introduction of experience rating [to be] an essential part of the change in emphasis towards an insurance scheme funded by premiums.”<sup>88</sup>

Apart from the fairness that might be associated with experience rating, however, there is some indication that the Government was also concerned with deterrence of accidents. Thus, for exam-

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84. *Id.* § 122(1)(a). Subsection (b) provides that the funds shall be derived: “[w]here there is no such premium, from the Earners’ Account (in the case of an earner) or the Non-Earners’ Account (in the case of a non-earner).” *Id.* § 122(1)(b). Presumably this subsection will apply when there is no class specified for a particular certified health professional and therefore no special premiums collected from members of that class.

85. It is interesting to note that the concept of a special medical misadventure fund was not specifically mentioned by Mr. Birch, the Minister of Labour responsible for the accident compensation scheme, in 1991 when he promulgated his report on the future of the scheme. See BIRCH, *supra* note 6. He did note, however, that “[t]here has been criticism of the scheme arising from the inadequacy of alternative means of calling medical practitioners to account for alleged negligence. There will be no return to the right to sue; instead, the Government will introduce legislation to effect changes in disciplinary procedures for the medical profession.” *Id.* at 31.

86. 1992 Act, *supra* note 8, §§ 104, 111, 116, & 124.

87. See *id.* While the language providing for experience rating of earners, self-employeds, motor vehicle owners, and health professionals appears to be discretionary—using the word “may”—the section dealing with experience rating of individual employers “on the basis of the actual costs of work injuries that occur in the employment of that employer” seems to be mandatory—using the word “shall.” Compare 1992 Act, *supra* note 8, §§ 111, 116 & 124 with *id.* § 104.

88. BIRCH, *supra* note 6, at 24.

ple, with regard to the assessment of a motor vehicle fuel tax, Minister Birch stated:

While impacting on all road users, this premium is expected to have a particular impact on young drivers, especially 16- to 24-year-old males. This group has a particularly high accident rate and therefore has a disproportionate effect on public health costs. They often drive vehicles owned by others, such as their parents, and this additional premium will impact on them directly when they purchase petrol.<sup>89</sup>

## V. CRITIQUE

At an international workshop entitled "Beyond Compensation: Dealing With Accidents in the 21st Century,"<sup>90</sup> former Prime Minister Geoffrey Palmer, who was heavily involved with Justice Woodhouse in the development of the original New Zealand scheme,<sup>91</sup> suggested that the new Act "hasn't got any coherent thinking in it at all. It is really unprincipled mishmash. . . ."<sup>92</sup> Is that a fair reading of the new Act?

It should be understood that the former Act was seen by its framers as just a way-station on the road to a perfect collective or welfare approach to disability.<sup>93</sup> That the scheme did not purport to cover incapacity by reason of illness was, in their view, only a temporary problem based on expediency, to be righted as soon as practicable. The recent election of the National Party, however, prevented the Labour government from taking this ultimate step, or at least a step toward a more comprehensive plan, in the form of a bill covering incapacity by reason of illness.

Quite clearly, the new Act is not viewed by its sponsors as a social insurance scheme, but as a scheme providing comprehensive accident insurance. From this perspective, therefore, the retention from the 1982 Act of tax-funded benefits for non-earners is clearly anomalous, since those benefits are only consistent with a welfare

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89. *Id.* at 27.

90. Beyond Compensation: Dealing with Accidents in the 21st Century, East-West Center, Honolulu, Hawaii (Mar. 22-24, 1992) [hereinafter Beyond Compensation]. The proceedings have been accepted for publication in the University of Hawaii Law Review.

91. See generally GEOFFREY PALMER, ACCIDENT COMPENSATION: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA (1979).

92. Beyond Compensation, *supra* note 90, Volume 2, at 26 (unpublished proceedings of Mar. 23, 1992).

93. See THE WOODHOUSE REPORT, *supra* note 10, at 26; REPORT NO. 4, *supra* note 11, at 7-10.

scheme. The retention of these benefits, however, is not too drastic a deviation from the new philosophy because the benefits paid to non-earners, even including the new \$40(N.Z.) per week independence allowance, do not include much if anything by way of disability income and undoubtedly only constitute, as they always have, a relatively small part of the scheme. Indeed, the poor treatment of non-earners, especially after depriving them of their civil actions for personal injuries, seems to constitute a serious area of injustice in the New Zealand scheme generally. Unfortunately, that has not changed very much under the new Act.

It does appear that the scheme, although outlined in a single statute, now embodies five distinctive schemes of compensation:

*First*, as just described, a modest welfare scheme for injured non-earners.

*Second*, a fairly classical workers' compensation scheme covering accidents and industrial diseases arising out of and in the course of employment and funded almost entirely by employers. While the scheme is rather generous in terms of earnings-related compensation, it will henceforth require injured employees to pay user-costs in order to get some of their health benefits.<sup>94</sup> This is less generous than most workers' compensation schemes in the United States, which usually cover all medical and rehabilitative expenses.<sup>95</sup>

The new "exempt employer" provision<sup>96</sup> seems similar, but not as far-reaching, as permission under most workers' compensation acts for qualified employers to self-insure or, at least, for employers to purchase insurance from private insurers.

Viewed in isolation as a separate system, therefore, there is nothing very exceptional about the provisions for compensation to earners for work injuries.

*Third*, the provisions dealing with compensation and premiums for earners' nonwork injuries constitute a first-party accident insurance scheme.<sup>97</sup> This scheme differs from private schemes in that (1) it is mandated by the Government; (2) the coverage is relatively comprehensive, including disability income, health and other benefits, rather than just lump sums or just disability income; and (3) a government corporation stands in for the private insurers who

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94. See *supra* note 57 and accompanying text.

95. See, e.g., MD. CODE ANN., LAB. & EMPL. §§ 9-660, 9-670 to -675 (1991) (covering not only medical and rehabilitative expenses, but also the cost of *vocational* rehabilitation in certain circumstances).

96. See 1992 Act, *supra* note 8, §§ 105-07 (covering exempt employers).

97. See *id.* § 38(5)(b).

might otherwise offer such insurance.<sup>98</sup>

*Fourth*, the scheme with regard to motor vehicle accidents<sup>99</sup> constitutes a total no-fault motor vehicle accident program. Presumably, it too will be fully funded—including public health costs—by user charges, that is, the premiums to be paid by owners and the fuel tax to be paid by drivers and owners who purchase the fuel.

*Fifth*, the new provisions dealing with medical misadventure<sup>100</sup> seem to establish a quasi-medical-malpractice action. Under the former Act it was necessary for the claimant to establish "medical, surgical, dental, or first aid misadventure,"<sup>101</sup> which was not otherwise defined in the Act. As Margaret Vennell described, there has been considerable difficulty in determining what kind of acts, omissions, or other medically related misfortunes constitute medical misadventure.<sup>102</sup> While judges have increasingly deemed proof of medical error amounting to a breach of the appropriate standard of care to be relevant to the question of medical misadventure in both omission-to-act<sup>103</sup> and other cases,<sup>104</sup> such proof was not relevant in every case.<sup>105</sup> It also remained at least theoretically possible to define medical misadventure in all cases in a way that focused on the accidental nature of the injury to the victim rather than on the fault of the medical professional.

Under the new Act, however, a fault requirement has been expressly inserted into the framework of the accident compensation system. With the exception of those who claim "medical mishap,"

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98. There is evidently an intention on the part of the government, however, to give further consideration to a greater role for private insurers. See BIRCH, *supra* note 6, at 61. Further, it might be possible, although the issue has evidently not been addressed, to permit an employer to become exempt and "self-insure" by purchasing insurance from a private carrier. See 1992 Act, *supra* note 8, §§ 105-06.

99. See 1992 Act, *supra* note 8, §§ 108-12.

100. See, e.g., *id.* §§ 5, 122-24.

101. 1982 Act, *supra* note 3, § 2(1), 1982 N.Z. Stat. 1560.

102. Margaret A. McGregor Vennell, *Medical Injury Compensation Under the New Zealand Accident Compensation Scheme and Medical Responsibility 7-22* (1992) (unpublished monograph). Professor Vennell, in addition to teaching law at the University of Auckland, also served as a member of the board of the former Accident Compensation Corporation.

103. *Id.* at 13-16.

104. *Id.* at 20-21 (discussing, *inter alia*, New Zealand cases involving: a failure to treat with appropriate antibiotics; continued prescription of a dangerous drug to an alcoholic; failure to warn of the risk of failure of a sterilization operation; and failure of a vasectomy operation and failure to warn of dangers of unprotected intercourse).

105. See, e.g., *id.* at 19 (describing an unreported New Zealand case holding that "a misdiagnosis of an 'extensive carcinoma' followed by the unnecessary removal of the entire stomach, distal oesophagus [sic], spleen and distal half of the pancreas," although not negligent, constituted medical misadventure).



which, as restrictively defined in the Act,<sup>106</sup> is likely to constitute a small minority of claims, all other medical misadventure claimants, to prevail, must establish "medical error,"<sup>107</sup> which essentially requires proof of negligence—that is, malpractice.

In addition to provisions requiring proof of medical negligence, there are other new provisions that give the medical professional an opportunity to be heard,<sup>108</sup> require that the Accident Corporation have expert advice,<sup>109</sup> require findings of medical negligence or other inappropriate action to be reported to a disciplinary or other body,<sup>110</sup> call for experience rating of premiums paid by health professionals,<sup>111</sup> and permit claimants and health professionals dissatisfied with a decision of the Accident Corporation to request a review of the decision and to appeal the decision of the reviewer through the courts.<sup>112</sup> Taken together, these new provisions are likely to create a highly adversarial proceeding or series of proceedings in

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106. For the new Act's definition of "medical mishap," see *supra* note 24.

107. See *supra* note 24. Section 5(1) of the new Act defines medical error as "the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances. It is not medical error solely because desired results are not achieved or because subsequent events show that different decisions might have produced better results." 1992 Act, *supra* note 8, § 5(1). Section 5(6) of the new Act disallows claims for failure to obtain informed consent unless "the registered health professional acted negligently in failing to obtain informed consent." Section 5(7) disallows claims for injury based on failure to diagnose the medical condition correctly or failure to provide treatment "unless the failure is negligent." Since personal injury caused by accident is a separate ground for coverage, a patient who suffers injury during treatment may not have to establish medical misadventure if she can show that she suffered injury caused by accident, see *id.* § 8(2)(a), or personal injury that was a consequence of treatment for personal injury, *id.* § 8(2)(d). Presumably, injury by accident can be established without proof of medical misadventure, for example, by proving that the patient suffered injury when a surgical instrument broke while within her body cavity. Cf. *Anderson v. Somberg*, 338 A.2d 1 (N.J.) (involving an operation in which the tip of an angulated pituitary rongeur broke off while the tool was being manipulated in plaintiff's spinal canal), *cert. denied*, 423 U.S. 929 (1975). That situation, however, may also qualify as a "medical mishap."

108. 1992 Act, *supra* note 8, § 5(10)(a).

109. *Id.* § 5(9).

110. *Id.* § 5(10)(b).

111. *Id.* § 124.

112. *Id.* § 89(3) (providing that a registered health professional dissatisfied with a decision under § 5(7) involving negligent failure to diagnose an illness or provide treatment, or a decision under § 5(6) involving negligent failure to obtain informed consent, may apply to the Accident Corporation for a review of the decision); see also *id.* § 90(4)(c) (allowing the registered health professional who applies for review "to be present and be heard either personally or by a representative"). The situations referred to in § 89(3), however, seem to exclude many, indeed probably most, other possible cases of medical error where negligence in treatment occurs. See *id.* § 5(1). Section 91 allows any person permitted to apply for review under § 89(3) to appeal to a District Court. See *id.* Section 97 permits an appeal of that decision to the High Court. See *id.* § 97. Ques-

which the issue is whether the tort of medical negligence has been committed!

This development, in turn, raises serious questions about the difficulties, costs, and delays a claimant will be likely to experience in seeking compensation for medical error. First, as Professor Vennell has noted, "[t]here is a possible danger that if the Accident Compensation Corporation becomes involved in the complaint procedure that injured patients will be disadvantaged."<sup>113</sup> In a medical community as small as New Zealand's,<sup>114</sup> it may be difficult to find expert witnesses to testify on a claimant's behalf. Second, there is a problem of affordability of legal costs. Although wrongful conduct or omissions on the part of the health professional will have to be established as in a medical malpractice action, the awards are not likely to come close to matching the large damages available in a conventional tort action for malpractice. Claimants ineligible for legal aid may find legal representation excessively expensive and may in any event not find the benefits worth the anguish of pressing the claim.

Finally, there is the problem of delays. Those claiming medical error—who might receive significant benefits if their claims are approved—may have to wait for extended periods while their claims wend their way through the courts. From the point of view of compensation to accident victims, therefore, the medical misadventure provisions leave much to be desired. One is tempted to characterize the new medical misadventure scheme as an unnatural union of fault and no-fault, grossly unfair to many victims of medical error.

There is, however, a potentially positive aspect to the new Act: the attempt to reassert accountability through experience rating. It has been my view that the former Act significantly undermined deterrence of accidents by externalizing accident costs and by eliminating from public consciousness the concept of negligence or fault with regard to personal injuries.<sup>115</sup> Under the 1992 Act, experience rating is mandatory for work injuries and may be inaugurated for all other categories where premiums are required.<sup>116</sup> This change reflects an intent to internalize the costs of accidents, and that intent is

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tions of law may then be appealed to the Court of Appeal on leave of the High Court or the Court of Appeal. *See id.* § 98.

113. Vennell, *supra* note 102, at 24. *See also* Walter Gellhorn, *Medical Malpractice Litigation (U.S.) - Medical Mishap Compensation (N.Z.)*, 73 CORNELL L. REV. 170, 197-202 (1988).

114. *See* Gellhorn, *supra* note 113, at 197-98 & n.79.

115. *See* Miller, *supra* note 9, at 78-80.

116. *See supra* note 87.

praiseworthy. Unfortunately, there may be insurmountable difficulties in attempting fairly to "experience rate" individual New Zealand employers,<sup>117</sup> and even greater problems may arise with regard to the experience rating of individual earners. On the other hand, as is the case with motorists in the United States, premiums might profitably be increased for those motor vehicle owners whose vehicles have been involved in the violation of traffic laws.

With regard to medical misadventure, to the extent that findings of negligence are now required for recovery in cases of medical misadventure, experience rating of health professionals may be fairly imposed.<sup>118</sup> Such increased premiums could serve to deter health-provider negligence. It is unfortunate, however, that the nature of the new system, as described above, will discourage medical misadventure claims, even justified ones. Increases in premiums, therefore, are not likely to come close to matching the actual costs of medical error.

It has been my view, set forth in my 1989 article,<sup>119</sup> that the best way to reintroduce deterrence into the New Zealand system would be to allow the corporation administering the system and the claimant to bring tort actions against persons who caused the injuries for which compensation is granted. If my approach were adopted, the Accident Corporation would seek to recover from tortfeasors, through subrogation, the value of benefits awarded under the Act; the individual could seek to recover tort damages not compensated by the Corporation. In the event of settlement, the Accident Corporation's claims would be primary.<sup>120</sup> Even though the new Act has reintroduced tort-like considerations in the area of medical injuries, and even though some provisions of the Act denying coverage may

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117. See New Zealand Law Commission, *Comment on "The Future of New Zealand's Accident Compensation Scheme"* by Richard S. Miller, 12 U. HAW. L. REV. 339, 341 (1990); REPORT No. 4, *supra* note 11, at 36-40.

118. Experience rating would be fair if the medical professional whose premium is increased because of negligence is actually given a reasonable opportunity to be heard. That would include the right to be represented by counsel, to testify, to present witnesses, and to participate fully through counsel on appeals. That is probably the case under the new Act: Section 90(4)(a) allows any person dissatisfied with a premium assessment, who seeks review as permitted in § 89(4), to be present and to be heard personally or by a representative. 1992 Act, *supra* note 8, § 90(4)(a). As with applications for review under § 89(3), decisions on review under § 89(4) may be appealed to a District Court, the High Court, and—with leave—to the Court of Appeal. See *supra* note 112.

119. See Miller, *supra* note 9, at 63-73.

120. See *id.* (discussing this approach in more detail).

reopen the door to full-scale tort actions that courts will allow,<sup>121</sup> the New Zealand government clings to the view that it is not reintroducing the tort system.<sup>122</sup>

## VI. CONCLUSIONS

### A. Fairness

The New Zealand accident compensation scheme continues to exhibit serious unfairness to non-earners. Neither the new independence allowance nor the election to purchase benefits for loss of earning capacity seem adequately to compensate non-earners who lose significant future earning capacity by reason of accident. This unfairness, as is often the case, will adversely affect women who are raising children or working at low-paying jobs, or both, at the time they suffer their accidental harm. There is also serious unfairness to claimants seeking compensation for medical error, by virtue of the hurdles they must clear and the costs they may have to incur before their entitlement to compensation is established.

There is other evidence of unfairness: before the original scheme was adopted, employers were not only liable for workers' compensation but were also subject to tort actions brought by their employees and most importantly, to personal injury actions, such as products liability actions, brought by non-employees. A significant trade-off was encompassed in the original scheme. In exchange for immunity from tort actions brought by workers and others, employers would cover their workers for nonwork-related as well as work-related accidents. Further, accident victims gave up their common-law right to recover for pain and suffering, in exchange for the availability of lump-sum payments, although limited in amount. Under the new Act, however, the employee has been deprived of both the lump-sum payment and the employer's payment to cover nonwork accidents. These benefits have been replaced only by an insignifi-

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121. Recall that tort actions are disallowed only in situations where the Act provides coverage. There are situations where coverage is not provided where the courts may well allow tort recovery, such as claims for mental distress unaccompanied by physical injury, *see* 1992 Act, *supra* note 8, §§ 4(1), 8(3), or for negligence or intentional wrongs involved in drug or clinical trials in which the claimant had agreed in writing to participate. *Id.* § 5(8).

122. BIRCH, *supra* note 6, at 1. It is interesting to note that the Act expressly provides for rights of subrogation for the Accident Corporation in those few cases where the accident victim retains a right of action at law. *See* 1992 Act, *supra* note 8, § 15. It would be relatively easy to require general subrogation simply by expanding this section of the Act and amending section 14, which bars tort actions for damages with respect to personal injury for which the Act provides coverage.

cant independence allowance of up to \$40(N.Z.) per week. On the other hand, employers remain exempt from both worker lawsuits and personal injury actions brought by others.

To state the dilemma more starkly, while benefits paid by employers have been significantly reduced, employers remain immune from product liability and other tort actions arising out of personal injuries to third persons. In effect, the costs of accidents negligently caused by manufacturing companies, agricultural producers, service companies, landlords, nonhealth professionals and other employers, are being subsidized both by accident victims and by workers who now pay individual premiums. This subsidy is in addition to the subsidy already provided to New Zealand employers by their immunity from personal injury tort liability. From a global perspective, New Zealand producers who participate in international markets will further increase their competitive advantage against firms from nations that allow liability claims by injured persons.

### *B. Philosophy*

It is true that no clear philosophy supports the five compensation systems encompassed by the new Act. Using the five "models for the management of risk and its consequences" suggested by Stephen Sugarman,<sup>123</sup> the non-earner provisions are still based on collective welfare notions, but the rejection of equal coverage for illness-caused disability is anticollectivist and illiberal. The workers' compensation feature, financed by employers, fits the liberal model. The compulsory nonwork injury accident insurance scheme for workers is a curious hybrid: authoritarian in its mandatory feature and collectivist in its administration by a state-run corporation, but conservative—if not libertarian—in having workers cover the costs through premiums. The quasi-fault-based medical misadventure scheme begins to move in a conservative direction by requiring proof of fault in most cases and possibly by imposing the costs of medical error on health care providers through experience rating, but it is liberal to the extent that claims are initially handled administratively, that medical mishap is not based on fault, and that compensation is limited. Similarly, the proposal to experience rate the premiums for the entire system and to require payment of user charges for medical and hospital benefits constitutes a further distancing from a collectivist welfare scheme. From this perspective,

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123. The models are libertarian, conservative, liberal, collective, and socialist. See *Beyond Compensation*, *supra* note 90.

therefore, the new Act does, indeed, seem to constitute an unprincipled mishmash.

There is, however, evidence of an overarching anticollectivist theme, perhaps prompted by New Zealand's dismal economic situation: with the glaring exception of non-earner accidents, the Accident Compensation System—and the Public Health System to the extent that it serves accident victims—are to be increasingly financed by premiums, user charges, and motor fuel taxes paid by individuals and firms, rather than by general taxation. This trend is in direct conflict with the preferences of the Law Commission and the Labour government and clearly reflects a departure from the principle of community or collective responsibility that guided the former scheme.

### *C. Accident Policy*

From a policy perspective, however, applying political labels is not nearly as significant as the extent to which the new scheme serves or disserves important values. In the case of an accident compensation scheme, well-being is clearly the primary value. Well-being may be served in two ways: (1) by compensating accident victims and (2) by preventing and deterring accidents.<sup>124</sup>

1. *Compensation.*—With regard to earnings-related compensation—that is, income replacement for earners—the new Act seems to provide compensation in about as adequate and timely a fashion as that provided in the prior Act. For most earners, benefits should continue to prove very adequate in replacing lost earnings, even without lump-sum payments for non-economic loss. The plight of injured non-earners—who have lost the right to receive lump-sums for non-economic losses—seems on the whole worse than under the prior Act, notwithstanding the availability of a meager independence allowance and limited optional insurance. The well-being of most victims of medical misadventure is likely to diminish significantly compared with their situation under the prior Act: those claiming medical error may find themselves embroiled in a contentious, if not adversarial, process subject to several appeals, which may delay their recovery or result in a denial of compensation altogether if fault cannot be proven. Few will qualify to recover under the highly restricted claim of medical mishap. Finally, with regard

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124. Professor Calabresi would refer to these as reducing secondary and primary accident costs, respectively. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 26-28 (1970).

to hospital, medical, and surgical expenses, accident victims will henceforth face "user part charges" and maximum limits on payments by the Accident Corporation for private hospitalization, which could have the effect of reducing victims' access to necessary health care.

2. *Deterrence.*—The intention to internalize accident costs is commendable. Notwithstanding doubts about the effectiveness of experience rating as a deterrent and its fairness to small firms and individuals, the possibility that a poor accident record can lead to higher premiums could reintroduce a greater consciousness of the need for safety and accident prevention into the national psyche—a consciousness that in my opinion has diminished since the advent of the accident compensation scheme. Because of those doubts, however, it remains to be seen whether and to what extent experience rating will actually be carried out.

Although the changes to medical misadventure are likely to undermine the comprehensiveness of the accident compensation scheme, they are, ironically, likely to strengthen considerably deterrence and injury prevention in the case of health care professionals, at least for the near term. Once it is learned that findings of medical error are to be reported to professional disciplinary bodies and that determinations of medical error can result in payment of higher premiums, health care professionals can be expected to react by undertaking greater care in the provision of health services. Indeed, it would not be a surprise to hear complaints that physicians are beginning to practice "defensive medicine" in order to avoid claims of medical error. On the other hand, once the weaknesses and ineffectiveness of the scheme—from the point of view of a claimant alleging medical misadventure—become understood, the deterrent effect is likely to decline.

Notwithstanding the confusion of principles and the weakness of deterrence, it is likely that, as to most of its features, the New Zealand scheme as amended will become even more attractive as a substitute for the tort system than the former Act. First, workers' compensation schemes are already in place in most developed nations. Second, the worker-financed nonwork-accident insurance scheme with employer withholding of premiums seems a relatively painless way to finance compensation for such injuries. Third, the total no-fault motor vehicle injury scheme financed by owner premiums and taxes on motor fuel may not appear too radical a departure in jurisdictions that are familiar with partial motor vehicle no-fault

schemes.<sup>125</sup> When one adds to this mix the perceived, if illusory, savings achieved by eliminating all personal liability and liability insurance for personal injury, the adoption of the new scheme, including even the limited but "free" benefits for non-earners, may appear very attractive to all but personal injury lawyers and those, like this commentator, who are concerned about deterrence of accidents and efficiency. Adoption of such a system outside of New Zealand to replace an ongoing tort system without provision for a tort liability *back-up* would in my opinion be most unfortunate.<sup>126</sup>

As to medical misadventure, the fact that New Zealand, the leading proponent of no-fault accident compensation in the world, has rejected its own no-fault approach for dealing with medical error and reintroduced fault—medical negligence—as a basis for compensation, could have a dampening effect on efforts, such as those in the United States,<sup>127</sup> to replace medical malpractice with a no-fault system.

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125. Quebec has already adopted a total automobile no-fault scheme. See Jeffrey O'Connell & Charles Tenser, *North America's Most Ambitious No-Fault Law: Quebec's Auto Insurance Act*, 24 SAN DIEGO L. REV. 917 (1987). The study that led to Hawaii's adoption of a partial no-fault plan for automobile accidents had recommended a "pure" no-fault scheme. See HALDI ASSOCIATES, INC., A STUDY OF HAWAII'S MOTOR VEHICLE INSURANCE PROGRAM 119, 127 (1972).

126. See Miller, *supra* note 9, at 63-80.

127. In Hawaii, for example, a Governor's Blue Ribbon Committee "has made a no-fault malpractice system . . . one of its top priorities for reining in health care costs." Kevin Dayton, *Doubts on No-Fault in Medicine; Hawaii Doctors, Nurses Skeptical about Changing System*, HONOLULU ADVERTISER, Aug. 28, 1992, at A2. See also American Law Institute Study, *Enterprise Responsibility for Personal Injury*, Vol. II, *Approaches to Legal and Institutional Change* 487-516 (1991); PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL 114-58, 161 (1991) (discussing no-fault for medical injuries and urging further serious consideration).